RECORD AND BRIEF

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Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,

Petitioner,

v.

JODIE NEVILS,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* NATIONAL GOVERNORS ASSOCIATION AND OTHER STATE AND LOCAL ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders,

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1. All parties have consented to the filing of this brief (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation (Rule 37.6).

collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

All state and local governments have a vital interest in the scope of federal regulatory authority. Often an expansion of federal authority means a restriction of state and local authority. If courts defer to federal agencies' determinations of the preemptory effect of statutes they administer, the scope of federal authority will expand—perhaps dramatically—and state and local authority will recede. *Amici* advocate the interests of state and local governments and their role in a productive partnership with the federal government. *Amici* thus have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

The Constitution reserves to the states and to the people those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. Today, federal agencies wield more power than ever and regulate many aspects of our daily lives, including in areas committed to the states. Agencies, however, have no power to act without a delegation of authority from Congress. Protecting our federalist system depends on judicial review of agency action to ensure that agencies are not exceeding their congressionally delegated authority at the expense of the states. The federal courts' ability to uphold the Constitution's respect for the sovereignty of the states is jeopardized if agencies have the broad power to issue preemptive interpretations of federal law to which courts must defer under *Chevron, U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

As a general proposition, separation-of-powers principles dictate that *Chevron* deference applies only when Congress delegated to an agency the authority to interpret with the force of law. This Court's cases make clear that the question of whether Congress has authorized an agency to provide an interpretation of a statute that carries the force of law is for the courts alone to decide. The appropriate inquiry is whether Congress delegated to the agency the authority to interpret the specific statutory ambiguity.

Agency interpretations that preempt state law raise questions not only about the separation of powers among the federal branches, but also about the appropriate balance of power between state and federal governments. A federal agency's interpretation that a statute displaces state law through preemption implicates complex questions of federalism, and thus it is especially important that the Judicial Branch exercise its constitutional authority to review agency action. Whereas agencies are specialized institutions focused on achieving their narrow regulatory objectives—often insensitive to the specific concerns of state and local governments—courts are far better suited to resolve these questions of constitutional federalism with a broad and unbiased focus.

Perhaps for this reason, Congress has directly and unequivocally authorized agencies to determine the scope of an express preemption clause when it wants agencies (and not the courts) to do so. Absent such an express and specific delegation of authority to a federal agency to issue preemptive regulations, the courts should decide the extent to which a federal law preempts a state law, giving due consideration to the powers reserved to the states. In cases like this one, involving an ambiguity in an express preemption provision, courts should not recognize an implied delegation of preemptive authority to the agency. To divine congressional intent, the courts should construe ambiguities in, or define the scope of, express preemption provisions.

ARGUMENT

I. SEPARATION-OF-POWERS PRINCIPLES PERMIT *CHEVRON* DEFERENCE ONLY WHEN CONGRESS HAS DELEGATED TO AN AGENCY THE AUTHORITY TO INTERPRET WITH THE FORCE OF LAW.

A. Judicial Review Ensures That Agencies Act Within Their Congressionally Delegated Authority.

An Executive Branch agency "may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Whatever power agencies have to regulate is derived solely from delegations of authority from Congress. "[A]n agency literally has no power to act, let alone pre-empt the validly

enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.* This Court has repeatedly affirmed the bedrock principle that administrative bodies have no inherent authority to act with the force of law. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."); *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 775 (2016) ("FERC cannot take an action transgressing" the limits of its delegated authority to regulate wholesale prices.). As the Court put it in *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), the "legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."

For nearly a century, the federal administrative state has proliferated in breadth and scope to assist in meeting the varied challenges of an increasingly complex world. Perhaps as a direct result of its expanded regulatory activity, the so-called fourth branch of government has enjoyed considerable independence. *E.g.*, Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) ("Of course, presidential control did not show itself in all, or even all important, regulation; no President (or his executive office staff) could, and

presumably none would wish to, supervise so broad a swath of regulatory activity."). The growth of the administrative state, "which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Preventing unfounded agency assertions of congressionally delegated authority is thus now more important than ever.

Under our separation-of-powers tradition, the Judicial Branch reviews agency action to ensure that agencies do not exceed the limits of their lawfully delegated authority. Congress has long endorsed judicial review of agency action. Most notably, Congress enacted the Administrative Procedure Act (APA), which provides that "[t]he reviewing court shall—. . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—. . . (C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right*[.]" 5 U.S.C. § 706(2)(C) (emphasis added). In section 706(2)(C), Congress expressed its general intent that courts should exercise independent judgment to enforce limits on delegated agency authority.

B. *Chevron* Deference Is Permissible Only When Authorized By Congress.

In *Chevron*, this Court embraced the principle that Congress often intends for federal agencies to

resolve the highly technical policy disputes that lurk beneath ambiguous provisions of the federal statutes that agencies are charged with administering. The logic underlying *Chevron* is that it is appropriate, indeed necessary, in certain circumstances, for courts to defer to an agency's policy expertise to fill in legislative gaps. 467 U.S. at 865-66.

The Court has also made clear that deference under *Chevron* must be considered in light of the critical role that independent judicial review plays in assuring that federal agencies do not exceed the limits of their delegated authority. The *Chevron* Court justified its rule of deference by observing that "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." *Id.* at 865. This presupposes that judicial deference to an agency's pronouncement on what a federal law means follows only after the judiciary has independently satisfied itself that the agency is acting within the scope of its authority. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the [agency]."). Put differently, a "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (citing cases).

Thus, an agency's interpretation of federal law

is not entitled to deference "merely because the statute is ambiguous and an administrative official is involved." *Gonzales*, 546 U.S. at 258 (declining to apply *Chevron* deference to agency's interpretation). Instead, courts afford *Chevron* deference to an agency's interpretation of a statutory ambiguity only after determining, independently, that Congress intended such an interpretation to carry the force of law. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).[2] "Courts have never deferred to agencies with respect to questions such as whether Congress has delegated to an agency the power to act with the force of law . . . ." Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 910 (2001).

Congress may explicitly or implicitly delegate authority to an agency to fill in a statutory gap or interpret a statutory ambiguity based on the agency's views of "wise policy." *See Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 844. If Congress has explicitly delegated authority, the judicial inquiry is relatively straightforward. If an agency claims an

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2. *See also City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring) ("The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently."); *id.* at 1885 (Roberts, C.J., dissenting) ("[B]efore a court can defer to the agency's interpretation of the ambiguous terms [of a statute], it must determine for itself that Congress has delegated authority to the agency to issue those interpretations with the force of law.").

implicit delegation of interpretive authority, however, the courts must ask whether it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229.

To warrant *Chevron* deference, Congress's delegation of authority (whether explicit or implicit) must extend to the specific statutory ambiguity at issue. In *Mead*, this Court framed the issue as whether Congress had delegated to an administrative agency the authority to interpret "a particular statutory provision." *Id.* at 226-27. In *Adams Fruit*, the Court recognized that "Congress clearly envisioned . . . a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate *standards* implementing AWPA's motor vehicle provisions," but concluded that Congress intended no such delegation "regarding AWPA's enforcement provisions." 494 U.S. at 650.[3] "It seems impossible that courts should do anything other than actually examine the full text

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3. *See also City of Arlington*, 133 S. Ct. at 1884 (Roberts, C.J., dissenting) ("When presented with an agency's interpretation of . . . a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over *the particular ambiguity at issue* has been delegated to the particular agency.") (emphasis added).

of the statute in order to determine whether the particular grant of authority extends to the contested provision at issue." Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 781 (2014).

The notion that a court should determine independently whether Congress intended to delegate to an agency the authority to interpret a specific statutory ambiguity, before the court applies *Chevron* deference, is inherent in the language of *Chevron* itself. The Court in *Chevron* asked whether Congress delegated to the Environmental Protection Agency authority "to elucidate a *specific provision* of the statute by regulation," and held that Congress had charged the agency "with responsibility for administering *the provision*." *Chevron*, 467 U.S. at 843-44, 865 (emphasis added). Understanding the *Chevron* doctrine as requiring a specific grant of statutory authority to the agency is consistent with the principle that reviewing courts must exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority.

II. FEDERALISM PRINCIPLES PRECLUDE *CHEVRON* DEFERENCE TO AGENCY INTERPRETATIONS OF PREEMPTIVE PROVISIONS, ABSENT AN EXPRESS DELEGATION TO ISSUE PREEMPTIVE REGULATIONS.

Preemption of state law by federal regulation prompts questions not only about the separation of

powers, but also about the proper federal-state balance. Delegated agency authority to preempt raises a host of issues apart from how to interpret ambiguities or fill gaps in federal law based on agency policy expertise—the core of *Chevron* deference. Due to the additional constitutional concerns that attend preemption of state law, there must be certainty that Congress intended to exercise its power under the Supremacy Clause to grant an agency preemptive power. Unless Congress expressly delegates to an agency the authority to determine the scope of the statute's preemptive effect, courts should decide preemption questions in order to protect the powers reserved to the states.

Independent judicial determination is critical when federal agencies seek to expand their power at the expense of state and local governments. Congress is vested with the ultimate authority to set the boundaries of agency authority in all of these areas, and courts have a duty to assure that the boundaries imposed by Congress are maintained. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374-75 ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."). A practice of deferring to agency determinations of the scope of agency authority to preempt state law, absent independent judicial review, would be at odds with the courts' traditional role as a bulwark against

agency overreach. The *Chevron* doctrine does not contemplate such a practice.

A. The Federal Courts Play A Critical Role In Protecting State Sovereignty Against Unauthorized Federal Encroachment.

Federal agencies commonly regulate the same or similar subject matter as state and local governments. Allowing federal agencies to determine the scope of federal preemption, with only highly deferential review by courts, would permit federal agencies to encroach upon the authority of state and local governments in these areas, with little, if any, constraint. As Professor Merrill has observed, "[g]iving *Chevron* deference to agency views about . . . express preemption clauses could result in a persistent expansion of federal authority at the expense of the states[.]" Merrill, *Step Zero After* City of Arlington, *supra*, at 786 (citation omitted). This case vividly illustrates the risk.

A federal agency's interpretation of a statutory ambiguity as preempting state law implicates important questions of federalism. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 488 (1996). Preemption displaces state governmental authority, eliminating the power of the states to act, often in areas where they have long been understood to exercise exclusive authority. Among these powers are health, safety, and related areas of insurance. *See id.* at 475. From the perspective of the states, there is little difference between a finding that state

law is preempted and a finding that state law is unconstitutional. Both nullify otherwise duly enacted state statutes and common law rules of decision. Both equally subtract from the power the states otherwise enjoy as sovereign entities. The interpretation of the scope of an express preemption clause thus has a critical effect on the balance of federal and state regulatory authority.

The judiciary has unique competence to resolve interpretive questions implicating constitutional federalism. Courts are more likely than agencies to be sensitive to broader constitutional concerns about maintaining the traditional federal-state balance and the historical context that gave rise to those concerns. *See* Merrill, *Step Zero After* City of Arlington, *supra*, at 786. When Congress's preemptive intent is less than clear, this Court has declined to defer to agency actions that raise serious questions of constitutional federalism, and has instead interpreted federal law to protect state sovereignty. *See, e.g.*, *Gonzales*, 546 U.S. at 275; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2000). The decision that a statutory provision displaces state law through preemption should be informed by an understanding of which areas of regulation reside with the federal government and which have been traditionally committed to the states as police powers. This decision also should be informed by an understanding of whether constitutional federalism would be jeopardized either

by a determination of concurrent authority or of exclusive federal competence. The judiciary is best suited to divine the balance that Congress intended to strike.

Agencies, on the other hand, are specialized institutions, intensely focused on achieving their narrow regulatory objectives. By design and tradition, they are not expected to ponder larger structural issues such as (i) the relative balance of authority between the federal and state governments, (ii) the importance of preserving state and local autonomy, (iii) the localized needs of the states, (iv) the value of allowing policy to vary in accordance with local conditions, and (v) the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (summarizing the systemic benefits of federalism). As Justice Stevens noted in dissent in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007), joined by Chief Justice Roberts and the late Justice Scalia, "administrative agencies are clearly not designed to represent the interest of States." (citation omitted). Thus, "[e]ven assuming that agencies have a superior understanding of the statutes they are specifically charged with administering, it does not follow that they have much, if any, understanding of constitutional law . . . or federalism." Merrill, *Step Zero After* City of Arlington, *supra*, at 786.

B. The Courts Should Defer To Agency Preemptive Determinations Only When Congress Has Expressly Delegated The Authority To Preempt.

Perhaps for these reasons, when Congress wishes to grant an agency authority to determine the scope of an express preemption provision, it does so in the text of the provision itself. *See Wyeth v. Levine*, 555 U.S. 555, 576 & n.9 (2009) (collecting statutes). For example, Congress specifically mandated that the Federal Communications Commission (FCC) "preempt the enforcement of [a state or local] statute, regulation, or legal requirement" if the agency determines that the state or local law "prohibit[s] the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a), (d). Similarly, under 30 U.S.C. § 1254(g), Congress clearly delegated to the Secretary of the Interior the power to "set forth any State law or regulation which is preempted and superseded by the Federal program." Likewise, Congress explicitly entrusted to the Secretary of Transportation the authority to decide "whether [a state] requirement" concerning the regulation of hazardous waste transportation "is preempted," and to "prescribe regulations for carrying out" that authority. 49 U.S.C. § 5125(d)(1)-(2). And Congress expressly authorized the Secretary of Health and Human Services to determine whether state requirements related to medical devices are preempted by the Federal Food,

Drug, and Cosmetic Act. *See* 21 U.S.C. § 360k. Congress is capable of speaking clearly, in the text of the express preemption provision itself, when it wants to grant a federal agency the considerable power to displace state law. That is decidedly not the case, however, under 5 U.S.C. § 8902(m).

This Court's decisions reflect the understanding that, absent a direct and unambiguous grant of preemptive authority from Congress to an agency, it is the role of the courts, and not the agency, to independently interpret the preemptive effect of a federal law. In *Wyeth*, for instance, the question before the Court was whether the drug labeling judgments of the Food and Drug Administration (FDA) preempted state common law product liability claims brought under the theory that more robust labeling practices were required to make drugs safe for use. *See* 555 U.S. at 563. In arguing that the state law claims were preempted, the petitioner urged the Court to give *Chevron* deference to an FDA regulation governing the content and format of drug labels, in which the agency declared that "FDA approval of labeling . . . preempts conflicting or contrary State law." *Id.* at 575 (citation omitted). The Court declined to afford *Chevron* deference to the FDA's regulation. *Id.* at 576-77. Instead, the Court conducted its own preemption analysis, in which it gave the "agency's explanation of state law's impact on the federal scheme" whatever "weight" it deserved based on "its

thoroughness, consistency, and persuasiveness." *Id.* at 577.

In determining that *Chevron* deference was not warranted, the *Wyeth* Court explained that "Congress has not authorized the FDA to pre-empt state law directly," and that "agencies have no special authority to pronounce on pre-emption absent delegation by Congress." *Id.* at 576-77. Although the Court acknowledged that an agency's views on preemption may merit consideration when, for example, the subject matter is technical, the Court explained that, "[e]ven in such cases . . . we have not deferred to an agency's *conclusion* that state law is pre-empted." *See id.* at 576. After *Wyeth*, the federal courts of appeals have concluded that "*Chevron* deference does not apply to preemption decisions by federal agencies." *Grosso v. Surface Trans. Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (collecting cases from the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits). As Justice Stevens stated in his dissent in *Watters*, "when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 550 U.S. at 41 (Stevens, J., dissenting).

This Court's decision in *Lohr* is similarly instructive. In that case, the Court addressed the scope of another express preemption clause in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k. *See* 518 U.S. at 495. The statute at issue in *Lohr* (unlike the preemption provision in this case)

expressly delegated to the agency the authority to "determin[e] the scope of [the statute's] pre-emptive effect." *See id.* at 495-96. Even then, this Court reached its own conclusion regarding the domain preempted by the statute. Although the Court's conclusion was "substantially informed" by the FDA's views about the statute's preemptive effect, the Court nevertheless applied something less than *Chevron* deference. *Id.* at 495-96; *see also id.* at 512 (O'Connor, J., concurring) ("Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to [the FDA's] regulations, but merely permits them to 'infor[m]' the Court's interpretation. It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference[.]") (citations omitted).

Petitioner and the Government try to undermine this conclusion by arguing that *City of Arlington* stands for the broad proposition that "[t]his Court has flatly rejected the assertion that *Chevron* applies piecemeal to some topics under a statute but not others." Pet'r Br. at 47; *see* United States Br. at 21-22. They argue that because Congress delegated some *Chevron* authority to the Office of Personnel Management (OPM) by virtue of the general conferral of rulemaking authority in 5 U.S.C. § 8913, Congress necessarily delegated to OPM authority to define the preemptive scope of 5 U.S.C. § 8902(m). This is incorrect. The statutory provision at issue in *City of Arlington* required that

state and local governments act on wireless siting applications "within a reasonable period of time after the request is duly filed." 47 U.S.C. § 332(c)(7)(B)(ii). The issue in that case was whether the FCC's interpretation of the phrase "reasonable period of time" was entitled to *Chevron* deference.

Unlike OPM's interpretation of the express preemption clause in this case, the FCC's interpretation of the phrase "reasonable period of time" did not displace any state law. In reaching its holding that the FCC's interpretation was entitled to *Chevron* deference, the Court observed that "this case has nothing to do with federalism," because "Section 332(c)(7)(B)(ii) explicitly supplants state authority by *requiring* zoning authorities to render a decision 'within a reasonable period of time,' and the meaning of that phrase is indisputably a question of federal law." *City of Arlington*, 133 S. Ct. at 1873. Here, on the other hand, OPM's administrative action has everything to do with federalism: if OPM's interpretation is afforded *Chevron* deference, it would erase Missouri common law prohibiting subrogation of personal injury claims for Missouri residents who work for the federal government. On that view, OPM might decide in the future to displace another state common law doctrine that it (or the insurance carriers providing coverage to federal workers) finds inconvenient. That cannot be what Congress intended in a statute that fails to confer express preemptive authority on the agency.

CONCLUSION

Interpreting the scope of an express preemption clause implicates both separation-of-powers and federalism considerations. Absent a direct congressional delegation of authority to an agency to preempt state law, the judiciary, rather than the agency, is best suited to interpret the law and to discern the appropriate constitutional balance between federal and state authority that Congress intended to strike.

Respectfully submitted,

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